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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2014-013573 12/14/2015

HONORABLE DOUGLAS GERLACH

CLERK OF THE COURT
S. LaFontaine/A. Quintana
Deputy

BENJAMIN MARIN, et al. ALEXANDER M KOLODIN

v.

ANGELO JOHN-MICHAEL LA FARO, et al. DENNIS I WILENCHIK

ARNO T NAECKEL
DOCKET-CIVIL-CCC

FINAL JUDGMENT

A motion to dismiss was filed on behalf of defendant Angelo John-Michael La Faro, which was met with a response filed on behalf of plaintiff Benjamin Marin.[1] Because the motion, in part, disputed rather than conceded the truth of the complaint's allegations[2] and in other ways relied not insignificantly on factual assertions beyond those alleged in the complaint,[3]

[1] The motion was directed at both Marin and plaintiff Citizens for a Better Arizona. All opposition papers state that they were filed only on behalf of Marin.

[2] See e.g., Motion at 4 (disputing substantive allegations of the complaint). Granting the motion as presented would have required the court to disregard that, when presented with a motion to dismiss, the court must accept all material facts alleged by the nonmoving party as true [*Acker v. CSO Chevira*, 188 Ariz. 252, 255, 934 P.2d 816, 819 (App. 1997) (citing *Lakin Cattle Co. v. Engelthaler*, 101 Ariz. 282, 284, 419 P.2d 66, 68 (1966))], view those facts "in the light most favorable to the nonmoving party" [*Mirchandani v. BMO Harris Bank, N.A.*, 235 Ariz. 68, 69, ¶2, 326 P.3d 335, 336 (App. 2014)], and "indulge [the nonmoving party] all reasonable inferences" that the pleaded facts permit [*Cullen v. Auto–Owners Ins. Co*., 218 Ariz. 417, 419, ¶7, 189 P.2d 344, 346 (2008)].

[3] See e.g., Motion at 3 (arguing that video published by La Faro "clearly shows" Marin engaged in criminal activity), 9 (arguing that accusation regarding Marin's purported criminal activity was true).

and the response was accompanied by exhibits constituting matters outside the complaint, the court converted the motion to a motion for summary judgment.[4]

The court has concluded that granting summary judgment is warranted given the record presented. Even though the record is sufficient to allow a reasonable juror to find that La Faro published false statements about Marin that are capable of defamatory meaning, Marin presented no competent evidence demonstrating that his reputation was in any way injured or that he otherwise experienced any compensable injury that can be attributed to those statements. Summary judgment remains warranted, moreover, even if La Faro's statements would otherwise support a claim for defamation per se, thus relieving Marin of the need to prove actual harm. There is no dispute that the statements capable of defamatory meaning pertain to a matter of public concern, and as such, Marin was required to, but did not, present sufficient evidence that La Faro made them despite knowing they were false or while entertaining serious doubts about their truth. In addition, the record does not support a claim based on either of Marin's additional theories of liability, namely false light invasion of privacy and intentional infliction of emotional distress.

Defamation.

Defamation consists of the publication of a communication that "tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Restatement (Second) of Torts* §559 (1977).[5] Defamation may occur not only by express language, but also by implication. *Yetman v. English*, 168 Ariz. 71, 77, 811 P.2d 323, 329 (1991) (recognizing that a statement is actionable if it "implie[s] a factual accusation"); *Burns v. Davis*, 196 Ariz. 155, 165, ¶39, 993 P.2d 1119, 1129 (App. 2000) (stating that "false assertions that . . . imply a factual assertion may be actionable").[6] That includes what is implied by the posing of a question. *E.g., Weller v. American Broad. Cos.*, 232

[4] To reach the result here, the court has considered (i) La Faro's motion to dismiss (11/20/14), (ii) Marin's response and cross-motion for summary judgment (7/15/15) and its accompanying statement of facts (which included Marin's affidavit), (iii) La Faro's response to the cross-motion (8/19/15), its two accompanying statements of fact, and the accompanying La Faro declaration, and (iv) Marin's reply (9/11/15). The court has also considered the arguments presented by the parties' attorneys at a hearing held on November 6, 2015, but only as argument and not, contrary to what seemingly was being urged at least some of the time, as evidence. *See e.g., Smith v. Mack Trucks, Inc.*, 505 F.2d 1248, 1249 (9th Cir. 1974) ("Legal memoranda and oral argument, in the summary judgment context, are not evidence").

[5] Arizona relies on the *Restatement* "as authority for resolving questions concerning rules in defamation cases." *Burns v. Davis*, 196 Ariz. 155, 162, ¶19, 993 P.2d 1119, 1126 (App. 1999).

[6] See also *Prosser & Keeton on the Law of Torts* §116 (W. Prosser et al. (eds.), 5th ed., Supp. 1988) (stating that "[the defendant] may be held responsible for the defamatory implication" of a statement).

CalApp.3d 991, 1004, 283 Cal. Rptr. 644, 653 (1991) (rejecting "the notion that . . . putting [an assertion of a defamatory fact] in the form of a question necessarily defuses the impression that the speaker is communicating an actual fact," thus "insulat[ing] the speaker from a defamation action"); *Maclaskey v. Mecartney*, 324 Ill. App. 498, 512, 58 N.E.2d 630, 637 (1945) (reversing trial court "holding that a libel could not be predicated upon statements put in the form of questions": "[I]t has been held repeatedly that the putting of words in the form of a question will in no wise reduce the liability of the defendant"); *Lutz v. Watson*, 136 A.D.2d 888, 890, 525 N.Y.S.2d 80, 81 (1988) (recognizing that "[t]he form of the language used is not controlling and a defamatory meaning may be conveyed by means of a question"); *see also Brooks v. Stone*, 170 Ga. App. 457, 458, 317 S.E.2d 277, 278 (1984) (question suggesting sexual promiscuity); *Rose v. Koch*, 278 Minn. 235, 244-45, 154 N.W.2d 409, 416-17 (1967) (concluding that defamatory meaning was implied by questions).

In the first instance, the court decides whether a statement is capable of a defamatory meaning. *Yetman*, 168 Ariz. at 79, 811 P.2d at 331; *accord Dube v. Likins*, 216 Ariz. 400, 418, ¶43, 167 P.3d 93, 105 (App. 2007) ("Whether a statement is capable of defamatory meaning is a question of law for the court"). When doing so, the court must not construe words and statements "in isolation; rather, consideration should be given to the context and all surrounding circumstances, including the impression created by the words used and the expression's general tenor." *Burns*, 196 Ariz. at 165, ¶39, 993 P.2d at 1129; *Restatement (Second) of Torts* §563 cmt. d (1977) (stating that "words which alone are innocent may in their context clearly be capable of a defamatory meaning and may be so understood"). Moreover, those words and statements are not "measured . . . by the critical analysis of a mind trained in the law, but by the natural and probable effect upon the mind of the average [person]." *Yetman*, 168 Ariz. at 77, 811 P.2d at 329; *see also Washington Post Co. v. Chaloner*, 250 U.S. 290, 293 (1919) (instructing that a "publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it"); *Rodriquez v. Panayiotou*, 314 F.3d 979, 986 (9th Cir. 2002) ("[T]he court must place itself in the position of the . . . reader, and determine the sense of meaning of the statement according to its natural and popular construction and the natural and probable effect it would have upon the mind of the average reader") (citation and internal quotation marks omitted)).

Most of what Marin characterizes as defamatory consists of statements that some may consider insulting or name-calling and perhaps vulgar (e.g., Marin is "disrespectful," a "violent thug," and "threatening," with no regard "for our laws" [see Marin Fact State. (7/15/15) at 2-3, paras. 9, 11]. Those statements, however, do not support a claim for defamation. *E.g. Breeser v. Menta Group*, 934 F.Supp.2d 1150, 1162 (D. Ariz. 2013) (stating that "obscenities, vulgarities, insults, epithets, name-calling, and other forms of verbal abuse are insufficient to raise a claim for defamation" (citation, internal quotation marks, and alteration omitted); *see generally Cohen*

v. California, 403 U.S. 15, 25 (1971) (Harlan, J.) (recognizing that it is "often true that one man's vulgarity is another's lyric").[7]

La Faro has conceded, however, that, on October 16, 2014, he posted an article on the Internet site of MCRCBriefs.org. [La Faro Fact State. (8/19/15) at 5-6, para. 20][8] That article included a link to a You Tube site where La Faro had posted a video. [La Faro Fact State. (8/19/15) at 5-6, paras. 18-20][9]

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[7] At the November 6 hearing, Marin's attorney argued that La Faro defamed Marin by falsely reporting that he had said to La Faro, "Go f**k yourself gringo," which, Marin's attorney insisted, is the equivalent of calling Marin a racist. [See La Faro Fact State. (8/19/15) at 5-6, para. 20] First, reasonable, common sense rejects the idea that "Go f**k yourself," however disgusting, is, in today's world, anything other than race-neutral. *See generally Lee v. Weisman*, 505 U.S. 577, 637 (1992) (Scalia, J., dissenting) ("We indeed live in a vulgar age"). Thus, the argument urged by Marin's attorney is that La Faro purportedly injured Marin by falsely accusing him of combining profane language with the word "gringo," as if people who refer to others by that word manifest racism. That contention is unsupported by any authority, much less persuasive authority, cited in any of Marin's submissions, and for that reason alone, the argument fails to compel the denial of summary judgment in favor of La Faro. *See e.g.*, Ariz. R. Civ. P. 7.1(a). Moreover, by no standard to which Marin's submissions have directed the court, and none that the court's own research has uncovered, can it be said that mere use of "gringo," without additional evidence, suggests racial animus. (At least one court has reached the same conclusion, and on facts far more compelling than the facts here. See *Hall v. Principi*, No. Civ.A. L-03-CV-90, 2006 WL 870190, at *10 (S.D. Tex. Apr. 3, 2006.)) After all, Arizona Corporation Commission records reveal that the term appears in the names of many Arizona businesses in good standing (e.g., ABC Gringo, El Gringo, Gringo Loco, and Old Gringo), not to mention other businesses that advertise and operate under names using the word "Gringo" (such as Gringo Star Street Bar, Go Gringo, and Dos Gringos). Nevertheless, if one were to assume that the alleged accusation amounts to labeling Marin a racist, although contemptible, that is not, without more, defamatory. *E.g., Northern Ind. Pub. Serv. Co. v. Dabagia*, 721 N.E.2d 294, 303 (Ind. App. 1999) (recognizing that "[w]hile racial slurs and epithets are contemptible and do not belong in a civil society, they are generally not defamatory in the absence of particular circumstances that make them so. It would be necessary to show either that the words were intended and understood to be a statement about the subject that was defamatory in itself or that, under the circumstances, lowered the subject in the eyes of the community or deterred others from associating with the subject"). Beyond that, even in those cases, unlike here, where a defamatory meaning is demonstrated, the plaintiff must then show "that special damages were caused by the statement. Damages are not presumed to follow from the statement as is the case in defamation per se." *Id.* (citation omitted). As explained in detail on the record, Marin has provided no competent evidence that attributing use of the word "gringo" to him has adversely affected his reputation, caused others to disassociate themselves from him, or otherwise caused him harm of any sort.

[8] That article remains available to Internet users. [See La Faro Dec. (8/19/15) at Ex. B; http://archives.mcrcbriefs.org/2014/10/10-17-14-mcrc-briefs.html (last accessed 11/14/15)] The MCRC Briefs site states that it operates independently of, and receives no financial support from "the Maricopa County Republican Committee, the Arizona Republican Party, . . . any candidate, candidate's committee, or any other political committee." [http://archives.mcrcbriefs.org/p/about-us.html (last accessed 11/14/15)]

[9] Because there is no dispute that La Faro posted the video on the Internet, and both parties' memoranda refer to its contents, the court has watched and considered it. [See https://www.youtube.com/watch?v=zYGzQXnGzw0 (last accessed 11/14/15); see also La Faro Dec. (8/19/15) at Ex. A; Pltf's. Fact State. (7/15/15) at 2, paras. 15-16]

The article describes a person wearing a t-shirt on which the words, "Citizens for a Better Arizona" appear, who arrives at a Maricopa County voting site with "a large box of hundreds of early ballots" and begins "stuffing the ballot box." [La Faro Fact State. (8/19/15) at 5-6, para. 20] The article goes on to state that "organizations like Citizens for a Better Arizona" "collect [unvoted ballots]" from people who attend "'ballot parties'" and then "vote them illegally." [*Id.*][10] The video on the linked You Tube site allows the public to identify Marin as the person described in the article and is accompanied by the following text: "Is this voter fraud? – You be the judge. . . . Stuffing the ballot box in Maricopa County AZ??" [*Id.* at 5, para. 19][11]

Although the La Faro motion maintains (at 4) that La Faro's article "never actually accused [Citizens for a Better Arizona] of voter fraud" and the You Tube posting "merely asked the public to be the judge of whether" Marin had participated in an act of voter fraud, fairly considered given the legal standards cited above, those publications are capable of defamatory meaning. The article can be reasonably interpreted to say that Citizens for a Better Arizona, with which the person in the t-shirt is identified, votes ballots illegally, and the reference to voter fraud on the You Tube site,[12] although posed as a question, can be reasonably understood to

[10] The complete statement in the article urges readers "not [to] forget the 'ballot parties' that occur where people gather en masse and reportedly give their unvoted ballots to operatives of organizations like Citizens for a Better Arizona so they cannot only collect them but vote them illegally. America use [sic] to be a nation of laws where one person had one vote. I'm sad to say not anymore." [La Faro Fact State. (8/19/15) at 5-6, para. 20]

[11] The parties do not dispute that what was captured on the video took place on August 25, 2014. [La Faro Fact State. (8/19/15) at 3, para. 9; Marin Fact State. (7/15/15) at 2, para. 6] The video shows that, at 12:55 p.m., Marin entered the building with a box that was full of election ballots, which he began depositing. With the exception of a 45 second interval when he appeared to be using a wireless device, Marin deposited ballots for approximately seven minutes. At 1:02 p.m., he can be seen leaving with the box, his wireless device, and one of the ballots that had been in the box when he arrived with it. Fewer than 40 seconds later, Marin returned with a single ballot. It is not possible to know from watching the video whether it was the same ballot with which he was seen leaving, although Marin says it was [Marin Fact State. (7/15/15) at 1, para. 4]. Marin deposited that single ballot and promptly left the building. Between the time that Marin walked through the door and into the building with the single ballot and the time that he walked through that same door to leave, nine seconds elapsed. The quality of the video (which has no accompanying audio) is not sufficient to allow one to know with any certainty what Marin said at any time and to whom, or what, if anything, was said by anyone to him.

The You Tube posting also directs the viewer to an article appearing on an Internet site other than the MCRC Briefs site. La Faro denies responsibility for publication of that article. [La Faro Fact State. (8/19/15) at 7, paras. 21, 24] Even if directing the reader to that article could be viewed as La Faro's adoption of what it says, the outcome here remains unaffected because the article says nothing of consequence that is not also reported in the MCRC Briefs article that La Faro has admitted posting.

[12] "Voter fraud" and "Stuffing the ballot box" on the You Tube site are considered a single statement. *See Central Ariz. Light & Power Co. v. Akers*, 45 Ariz. 526, 538-39, 46 P.2d 126, 132 (1935) (recognizing that "a headline and the item of which it is a part are to be considered as one instrument in determining the effect of an article

imply a fact, namely that the person in the video (i.e., Marin) can be seen engaging in illegal voting activity.[13]

La Faro's motion goes on to maintain (at 4, 7, 9) that, irrespective of any defamatory meaning that may be suggested by the You Tube posting and MCRC Briefs article, Marin's claim must be dismissed for any of the following reasons: (i) truth is an absolute defense, (ii) La Faro's postings merely expressed his opinion, and (iii) La Faro's postings were conditionally privileged.

Neither the video nor any other evidence in the record establishes that Marin engaged in criminal activity, including and especially, as La Faro's motion (at 2-3) would have it, conduct proscribed by A.R.S. §16-1016 (7, 9). Subsection 7 of that statute prohibits the unlawful "carr[ying] away" or "remov[al]" of a ballot "from the polling place." That provision is designed to prevent voters from entering a polling place, obtaining a ballot from an election official, and then leaving before turning it in. The statute is not directed at a person who arrives with a ballot and then leaves before depositing it. Otherwise, for example, a voter who discovers after entering the polling place that his ballot is unsigned commits a felony by leaving to retrieve a pen and sign it. In short, what Marin can be seen doing in the video does not fit what subsection 7 was intended to prevent. Subsection 9 prohibits the "alter[ation]" of a ballot. The video does not show Marin altering any ballot. Accordingly, because "voter fraud" and La Faro's article are capable of being understood to suggest criminal conduct, the record here does not allow recognition of truth as a defense to Marin's defamation claim. And, because voter fraud of the type implicated here is "punishable by imprisonment," Marin's defamation claim may be treated as a per se claim for presumed damages even though, as explained on the record during the November 6 hearing, Marin has not presented competent evidence that would

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complained of as being defamatory"). Apart from that, merely because "stuffing the ballot box" could have a neutral connotation, that does not preclude it from serving as a basis for a defamation claim when, as here, it is also susceptible of a connotation that is defamatory. *See e.g., Flowers v. Carville*, 310 F.3d 1118, 1127-28 (9th Cir. 2002) (recognizing that "doctored" could have both neutral and defamatory connotations).

[13] Although, in the first instance, whether a statement is capable of defamatory meaning presents a question of law [*Dube*, 216 Ariz. at 418, ¶43, 167 P.3d at 105], when making that determination, the court must view the facts relevant to that question in the way that is most favorable to Marin. *E.g., Airfreight Express Ltd v. Evergreen Air Center, Inc.*, 215 Ariz. 103, 106, ¶2, 158 P.3d 232, 235 (App. 2008) (stating that, on summary judgment, the court must view the evidence and all reasonable inferences that such evidence will permit in the way that is most favorable to the party opposing summary judgment); *Esplendido Apartments v. Olsson*, 144 Ariz. 355, 361, 697 P.2d 1105, 1111 (App. 1985) (same); *see also Wimbley v Cashion*, 588 F.3d 959, 961 (8th Cir.) (recognizing that, when deciding a question of law on summary judgment, the predicate facts are viewed in the light most favorable to the nonmoving party); *Kabile, Ltd. v. Levavy*, Civ. No. 2:11-5078(KM), 2015 WL 74063, *4 (D. N.J. Jan. 6, 2015) ("On summary judgment, factual matters that may bear on [a] question of law must be resolved in the light most favorable to the non-moving party").

otherwise allow an award of compensatory damages. *Restatement (Second) of Torts* §571 (1977); *Modla v. Parker*, 17 Ariz. App. 54, 56, 495 P.2d 494, 496 (1972).

Although La Faro maintains that "voter fraud" and his article merely reflect his opinion, that does not end the inquiry. An opinion may constitute actionable defamation if it implies a false assertion of fact. *Yetman*, 168 Ariz. at 75, 811 P.2d at 327 (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 18 (1990)). An opinion is protected from a defamation claim only if (i) it could not be reasonably interpreted as stating an actual fact, or (ii) it is not provable as false. *Id.* at 76, 811 P.2d at 328. A reasonable jury could conclude that what La Faro's motion characterizes as an opinion implies the existence of a fact. *See Burns*, 196 Ariz. at 165, ¶39, 993 P.2d at 1129 (App. 1999) (stating that generally the jury determines whether an ordinary listener would believe a statement to be a factual assertion or mere opinion); *accord Breeser*, 934 F.Supp.2d at 1162 (stating that "[w]here the allegedly defamatory statement could reasonably be construed as either fact or opinion, the issue should be resolved by the jury"). And, to say that Marin was engaged in illegal voting activity is capable of being proven false. Thus, given the record here, the assertion that La Faro was merely expressing an opinion is insufficient to allow summary judgment in his favor.

La Faro has no defense, privileged or otherwise, based on the notion that, for purposes of this case, Marin is a limited public figure. [See La Faro Response (8/19/15) at 7] Marin was and is not a public figure of any sort.[14] Moreover, it is no defense that La Faro's statements concerned a matter of public interest. [See *id.* at 6] A private person, like Marin, may recover compensatory damages when defamed by a statement pertaining to a matter of public concern merely upon a showing that the defendant was negligent. *E.g.*, *Scottsdale Pub., Inc. v. Superior Court*, 159 Ariz. 72, 75, 764 P.2d 1131, 1134 (App. 1988).[15] Marin has not, however, presented

[14] The record here permits no conclusion other than that Marin was a private citizen performing volunteer work when the episode occurred that precipitated La Faro's Internet postings. And, given the record here, nothing for which Marin is responsible while that episode unfolded transformed him into a limited public figure. *See Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 483-84, 724 P.2d 562, 560-70 (1986) (recognizing that a private individual who is drawn into a public controversy "largely against his will" is not a public figure) (quoting *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157, 168-69 (1979)). In any event, whether Marin should be treated as a limited public figure or a private person is of no consequence because, as explained below, he has no claim other than for presumed damages, which treats public and private persons alike when, as here, the statement said to be defamatory pertains to a matter of public concern.

[15] Marin has conceded that the voter fraud accusations pertain to a matter of public concern. [Marin Response (7/15/15) at 2 (stating that whether Marin "had engaged in voter fraud" was "an issue of undisputed public importance")] See also *Obsidian Finance Group, LLC v. Cox*, 740 F.3d 1284, 1292 (9th Cir. 2014) (Internet postings accusing bankruptcy trustee of illegal activities: "Public allegations that someone is involved in crime generally are speech on a matter of public concern").

competent evidence of any actual harm that he has experienced sufficient to support an award of compensatory damages.[16]

Nevertheless, the failure to present admissible evidence of damages that have been experienced is not necessarily fatal to a defamation claim. A private person, like Marin, may recover "presumed" damages without proof of any actual harm when defamed by a statement pertaining to a matter of public concern. But, he may do so only upon a showing that the

[16] Evidence in support of and opposition to a summary judgment motion must be based on admissible evidence. *Orme School v. Reeves,* 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990) (stating that inadmissible evidence is "insufficient to withstand a motion for summary judgment"); *Villas at Hidden Lakes Condo. Ass 'n v. Geupel Constr. Co.*, 174 Ariz. 72, 81, 847 P.2d 117, 126 (App. 1992) (stating that facts presented on summary judgment must be in the form of admissible evidence). Moreover, and contrary to what Marin's attorney urged at the November 6 hearing, one cannot avoid summary judgment merely by insisting that any evidentiary shortcomings afflicting a party's opposition will be cured at trial. *E.g., Garside v. Osco Drug, Inc.*, 895 F.2d 46, 49 (1st Cir. 1990) (recognizing that "a mere promise to produce admissible evidence at trial does not suffice to thwart summary judgment"); *see also First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 289-90 (1968) (rejecting argument that plaintiffs should be permitted "to get to a jury on the basis of the allegations in their complaints, coupled with the hope that something can be developed at trial in the way of evidence to support those allegations"); *Neely v. St. Paul Fire & Marine Ins. Co*., 584 F.2d 341, 344 (9th Cir. 1978) (stating that denial of summary judgment is not warranted based on hope of party opposing motion that he can produce evidence at trial); *see generally Crawford v. Lamantia,* 34 F.3d 28, 31 (1st Cir. 1994) (holding that "neither conclusory allegations, improbable inferences, and unsupported speculation nor brash conjecture coupled with earnest hope that something concrete will materialize is sufficient to block summary judgment" (citations, internal quotation marks, and alterations omitted)); *Cullison v. City of Peoria,* 120 Ariz. 165, 168, 584 P.2d 1156, 1159 (1978) ("It is well established that the opponent of a motion for summary judgment does not raise an issue of fact by merely stating in the record that an issue of fact exists").

For reasons detailed on the record, Marin's opposition (including his cross-motion) to La Faro's motion is not supported with admissible evidence. Those reasons will not be repeated here except to say that, to avoid summary judgment, Marin's opposition filings rely substantially on exhibits that were (i) unauthenticated and (ii) offered for the truth of matters asserted in them for which no exception to the hearsay rule applies. Neither unauthenticated documents nor hearsay may be considered on summary judgment. *E.g., Portonova v. Wilkinson,* 128 Ariz. 501, 502, 627 P.2d 232, 233 (1981) (rejecting affidavit that contained hearsay); *Borbon v. City of Tucson,* 27 Ariz. App. 550, 551, 556 P.2d 1153, 1154 (1976) (stating that "the court may not take cognizance of positions regarding the facts based upon exhibits that are merely parts of the briefs and have not been otherwise verified or supported"); *see also Canada v. Blain's Helicopters, Inc*., 831 F.2d 920, 925 (9th Cir. 1987) (holding that unauthenticated "documents may not be relied upon to defeat a summary judgment motion"). Moreover, Marin's exhibits purport to be evidence of statements defaming him that originated with La Faro. La Faro, however, has denied any responsibility for the publication of those exhibits or what is said in them. [La Faro Dec. (8/19/15) at 6, paras. 17-18] And, Marin has offered no evidence that allows treating those denials as anything other than undisputed facts. *See e.g., Lauren W. ex rel. Jean W. v. DeFlaminis*, 480 F.3d 259, 272 (3d Cir. 2007) (affirming summary judgment: "[I]n considering a motion for summary judgment the court should believe uncontradicted testimony unless it is inherently implausible even if the testimony is that of an interested witness"); *cf. Southwest Airlines Co. v. Arizona Dep't of Revenue*, 217 Ariz. 451, 459, 175 P.3d 700, 708 (App. 2008) (characterizing uncontradicted affidavit of defendant's expert as evidence of material facts that were "undisputed or conceded").

statement was made with "actual malice." *Dombey v. Phoenix Newspapers, Inc.*, 150 Ariz. 476, 481, 724 P.2d 562, 567 (1986); *see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 756-57 & n.5 (1985).

"[T]here is a significant difference between proof of actual malice and mere proof of [a false statement]." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 511 (1984). Actual malice is shorthand for "knowledge of [the] falsity or reckless disregard for [the] truth." *Scottsdale Pub.*, 159 Ariz. at 75, 764 P.2d at 1134. Reckless disregard for the truth means it is likely the defendant entertained serious doubts about the truth of the statement but published it despite those doubts. *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *see also Dombey v. Phoenix Newspapers*, 150 Ariz. 476, 487, 724 P.2d 562, 573 (1986). But, on a defamation claim for presumed damages, even private persons like Marin must produce clear and convincing evidence of actual malice to reach a jury. *Scottsdale Pub.*, 159 Ariz. 82, 764 P.2d at 1141; *see also Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 335 n.6 (1974).

Thus, "where the factual dispute concerns actual malice, . . . the appropriate summary judgment question will be whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not." *Anderson v. Liberty Lobby*, 477 U.S. 242, 255-56 (1986) (emphasis added).[17] The only attempt to demonstrate that La Faro's statements suggesting illegal voting activity were accompanied by actual malice appears in Marin's reply memorandum (at 4). There, Marin insists that a quotation attributed to La Faro stating that Marin's actions "likely don't run afoul of Arizona electoral law" is inconsistent with outright accusations of criminal conduct, and that inconsistency establishes that La Faro knew his (at least implicit) accusations about unlawful voting activity were false or, at least, he entertained serious doubt about their truth. That purported quotation, however, may not be considered here because it has not been submitted in the form of admissible evidence. The quotation appears in an out-of-court statement (i.e., an article on the dailycaller.com Internet site), which is offered for the truth of the matter asserted (i.e., that the quotation attributed to La Faro is both his and accurate).[18] The Marin response attempts to overcome that insufficiency by relying on La Faro's declaration (at para. 16), which acknowledges that he was interviewed for the dailycaller.com article. But, it is one thing for a person to say that he was interviewed, and a much, much different thing to confirm that what was reported is an accurate representation of what was said during the interview. No admissible evidence in the record establishes the latter. Otherwise, Marin's response and accompanying statement of facts do not address the issue of actual malice as it

[17] "Clear and convincing" means that the truth of the asserted proposition is "highly probable." *E.g., State v. Roque*, 213 Ariz. 193, 215, ¶75, 141 P.3d 368, 390 (2006).

[18] See note 16, above.

pertains to the statements suggesting unlawful voting activity, much less identify competent, clear and convincing evidence of actual malice.[19] And, as explained, the statements regarding voter fraud and voting illegally are the only statements in this record that may be considered defamatory.[20]

False Light.

Unlike defamation per se, a claim based on a false light theory does not permit recovery for damages that are presumed. The claim requires proof of actual harm and the resulting damages that have been actually experienced. *Restatement (Second) of Torts* §652(H); *Solano v. Playgirl, Inc.*, 292 F.3d 1078, 1087 (9th Cir. 2002) (recognizing that damages is an "element necessary to prove a case for false light"); *Machleder v. Diaz*, 801 F.2d 46, 56 (2d Cir. 1986) (stating that "false light law makes no distinction between slander per se and slander requiring proof of special damages"); *see also Kish v. Iowa Central Comm'ty College*, 142 F.Supp.2d 1084, 1100 (N.D. Iowa 2001) (granting summary judgment: "[plaintiff] has failed to generate a genuine issue of material fact on the essential element of damages on his 'false light' claim").

The record fails to establish that Marin experienced any injury attributable to the false light purportedly created by anything that La Faro may have said or written. For example, Marin's evidence fails to identify even one person who formed a negative impression of Marin based on La Faro's postings, nor has Marin identified any other harm that he has experienced as the result of the false light to which he was purportedy subjected. Without that evidence, the claim fails. *E.g.*, *Castello v. City of Seattle*, No. C10-1467 MJP, 2011 WL 6000781, at *10 (W. D. Wash. Nov. 30, 2011) (granting summary judgment: "Plaintiff's false light . . . claim[] [is]

[19] Negligence is not recklessness and cannot support a finding of actual malice. *St. Amant*, 390 U.S. at 731. Ill will or hostility, by itself, does not prove actual malice. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 667 (1989); *Hotchner v. Castillo-Puche*, 551 F.2d 010, 914 (2d Cir.), *cert. denied* 434 U.S. 834 (1977). Likewise, an incorrect interpretation or understanding of the law is not proof of actual malice. *Cf. Ryan v. Brooks*, 634 F.2d 726, 733 (4th Cir. 1980) (incorrect interpretation of a report). And, "the falsity of a statement alone is not enough to create an inference of actual malice." *Dick v. J.B. Hunt Trans., Inc.*, 772 F.Supp.2d 806, 825 (N.D. Tex. 2011); *accord Kelley-Moser Consult., LLC v. Daniels*, C.A. No. 3:10-CV-02057-CMC, 2012 WL 554643, at *14 (D. S.C. Feb. 21, 2012); *Rush-Hampton Indus., Inc. v. Home Ventilating Inst.*, 419 F. Supp. 19, 22 (M.D. Fla. 1976).

[20] The court remains mindful that, whether the privilege to comment on matters of public importance has been abused and, thus, forfeited, is a jury question. *See Green Acres Trust v. London*, 141 Ariz. 609, 616, 688 P.2d 617, 624 (1984) (stating that "[w]hether the occasion for the privilege was abused is a question of fact for the jury"); *Melton v. Slonsky*, 19 Ariz. App. 65, 68, 504 P.2d 1288, 1291 (1973) (stating that "[u]nless only one conclusion can be drawn from the evidence, the determination of the question whether the privilege has been abused is for the jury"). But because Marin has failed to present competent, clear and convincing evidence of actual malice, which is an indispensable element of his claim (given the failure to present evidence that would allow an award of damages other than presumed damages), there ceases to be any jury question because the case does not get to the jury.

completely lacking proof of damages. . . . [H]e fails to present proof of a single coworker who actually had a negative impression of him . . . , or of a single harm which befell him as a result of the false light he alleges was shed on him"); *see also Kish*, 142 F.Supp.2d at 1100 (granting summary judgment: plaintiff failed to present "hard facts" that he "suffered some damage as a result of any publication that allegedly placed him in a 'false light'").

Intentional Infliction of Emotional Distress.

Given the record, the La Faro Internet postings do not support a claim for damages based on the intentional infliction of emotional distress. Recovery for intentional infliction of emotional distress requires a showing of conduct "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency." *Mintz v. Bell Atl. Sys. Leasing Int'l, Inc.*, 183 Ariz. 550, 554, 905 P.2d 559, 564 (App. 1995) (citation and internal quotation marks omitted); *see also Olive v. City of Scottsdale*, 969 F. Supp. 564, 577 (D. Ariz. 1996) (stating that "[t]he conduct required to support a cause of action for intentional infliction of emotional distress falls at the very extreme edge of the spectrum of possible conduct") (citation and internal quotation marks omitted)). Initially, "[t]he trial court must determine whether the acts complained of are sufficiently extreme and outrageous to state a claim for relief" [*Mintz*, 183 Ariz. at 554, 905 P.2d at 563; *Patton v. First Fed. Sav. & Loan Ass'n*, 118 Ariz. 473, 476, 578 P.2d 152, 155 (1978)] while recognizing that the "high standards" necessary to sustain the claim are not easily met [*see e.g., Johnson v. McDonald*, 197 Ariz. 155, 160, ¶24, 3 P.3d 1075, 1080 (App. 1999) (affirming dismissal of claim)]. Even assuming that Marin has been falsely accused of criminal activity, that is insufficient to sustain a claim for intentional infliction of emotional distress. *See Daemi v. Church's Fried Chicken, Inc.*, 931 F.2d 1379, 1388 (10th Cir. 1991) (holding that employer did not commit intentional infliction of emotional distress when it accused employee of criminal conduct); *see also Pankratz v. Willis*, 155 Ariz. 8, 18, 744 P.2d 1182, 1192 (App. 1987) (recognizing that a defendant's "[c]onduct may be otherwise tortious, and even illegal" and still be insufficient to support a claim for infliction of emotional distress).[21]

Independent of that, and as explained on the record during the November 6 hearing, in response to La Faro's motion, Marin was required to come forward with some evidence establishing that he has experienced not merely emotional distress, but "severe" emotional distress. *Citizen Pub. Co. v. Miller*, 210 Ariz. 513, 516, ¶11, 115 P.3d 107, 110 (2005) (remanding with instructions to dismiss intentional infliction of emotional distress claim); *see also Moore v. Marriott Intern., Inc.*, No. CV-12-00770-PHX-BSB, 2014 WL 5581046, at *20

[21] Although it is not clear, if Marin contends that being falsely accused of using the word "gringo" somehow supports a claim for intentional infliction of emotional distress, he has failed to show with his evidence or with a citation to any applicable authority that the accusation meets the standard recognized in *Mintz*.

(D. Ariz. Oct. 31, 2014) (granting summary judgment: "Plaintiff does not cite any evidence indicative of severe emotional distress in opposition to Defendant's motion for summary judgment"). Instead of doing so, Marin has attempted to avoid summary judgment merely on the basis of a conclusory statement about having suffered "profound mental anguish." [Marin Aff. (7/15/15) at 2, para. 6] In none of Marin's submissions, however, including and especially Marin's affidavit, is there any evidence of how the purported mental anguish has manifested itself (e.g., headaches, sleeplessness, increased blood pressure, prescribed medications, inability to work or focus, the need for any type of therapy, or anything else). And, conclusory statements of fact are insufficient to withstand summary judgment. *E.g., Florez v. Sargeant,* 185 Ariz. 521, 526, 917 P.2d 250, 255 (1996) ("affidavits that only set forth ultimate facts or conclusions of law can neither support nor defeat a motion for summary judgment"); *Pace v. Sagebrush Sales Co.,* 114 Ariz. 271, 275, 560 P.2d 789, 793 (1977) ("Mere conclusions of ultimate facts and law and general allegations do not fulfill the requirement that supporting affidavits set forth specific facts"); *Yavapai County v. Wilkinson,* 111 Ariz. 530, 532-33, 534 P.2d 735, 737-38 (1975) (statements that "are more in the nature of conclusions rather than specific facts" are not sufficient to avoid summary judgment).

Conclusion.

No purpose is to be served by prolonging this litigation and submitting the case to a jury.

IT IS ORDERED:

1. La Faro is granted summary judgment in his favor and against plaintiff Benjamin Marin. The claims asserted by Marin against La Faro are dismissed.

2. La Faro is granted summary judgment in his favor and against plaintiff Citizens for a Better Arizona. Nothing submitted in opposition to La Faro's motion represented an attempt on Citizen's behalf to avoid summary judgment. The claims asserted by Citizens for a Better Arizona against La Faro are dismissed.

3. La Faro has asserted a claim for attorney's fees that A.R.S. §12-349 and Ariz. R. Civ. P. 11 would allow. [La Faro Motion (11/20/14) at 1-2, 13]. The record, however, does not support an award under either that statute or rule. Merely because a court rejects a party's position, wholly or in part, does not mean that the party acted unreasonably. *See Morris v. Giovan,* 225 Ariz. 582, 585, ¶15 242 P.3d 181, 184 (App. 2010) (concluding that plaintiff/appellant's appeal was not unreasonable while affirming denial of his request for relief). Contrary to the assertion that the filing of this lawsuit was an act of retaliation intended by Marin to harrass – an assertion that is unsupported by any citation to anything [see La Faro Motion (11/20/14) at 13] – the record, fairly considered, shows that Marin's view of the

submitted evidence in light of applicable law (including evidentiary standards) was, at worst, misguided, and thus, the pursuit of his claim was ill-conceived but not ill-willed.

4. No matters remain pending in this case. This is a final judgment under Ariz. R. Civ. P. 54(c).

Date: _____

/ s / HONORABLE DOUGLAS GERLACH

JUDGE OF THE SUPERIOR COURT